



NO. 83-958

IN THE SUPREME COURT
of the
UNITED STATES

October Term 1983

PORT OF TACOMA,
Petitioner,

vs.

PUYALLUP INDIAN TRIBE,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR
WRIT OF CERTIORARI TO UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUYALLUP TRIBE OF INDIANS,
Plaintiff,

vs.

PORT OF TACOMA,
Defendant.

NO. C80-164T
MEMORANDUM OPINION
FINDINGS OF FACT
AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

This case came on regularly for trial before the above named court on May 4, 1981. Jurisdiction in this case is under 28 U.S.C. 1362. Venue is proper in this court in that the Puyallup river, which is at issue here, runs through the Western District of Washington and empties into Puget Sound at Tacoma, Pierce County, Washington.

The final Pretrial Order was filed on April 27, 1981. Counsel for both parties appeared, oral testimony of witnesses was taken, exhibits were filed, affidavits of other witnesses were filed for consideration by the court. Pretrial briefs, and final arguments were made by both parties. Both parties submitted post-trial briefs. Findings of Facts and Conclusions of Law, before trial and after trial, were submitted for the court's

consideration. The cases cited by both parties as possible authority for any of the issues involved herein were all read and considered by the court.

The court has heard, reviewed, weighed and evaluated all of the evidence in accordance with the applicable Federal Rules of Civil Procedure, Local Rules and the Rules of Evidence.

Although the court did not believe that the United States of the State of Washington were indispensable or necessary parties in this case, the court did invite both to file amicus curiae briefs. The United States did not respond, but the Attorney General of the State of Washington did file a brief. The court has considered that brief.

SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issues in this case, as the court understands them does not involve Indian treaty fishing rights as such. But, the history of the Puyallup Indians as to fishing on the Puyallup River is one of the basic issues before the court.

The parties are before the court seeking an order quieting title to two parcels of real property. The Puyallup Indian Tribe, the Plaintiff herein, and the Port of Tacoma, the Defendant herein, each claim ownership of the two parcels of real property located within the exterior boundaries of the Puyallup Indian Reservation.

The court has read the decisions in *Puyallup I*, 391 U.S. 392, 88 S.Ct. 1725, 20 L. Ed. 2d 689, and *Puyallup II*, 414 U.S. 544, 94 S. Ct. 330, 38 L. Ed. 2d 254, and *Puyallup III*, 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 667. The decisions in those cases are not dispositive of the issues here. Those cases involved state regulations in the interest of conservation as to Indian treaty fishing rights, net fishing for steelhead trout, by Indians, on the Puyallup Reservation, and the issue of whether or not the Puyallup Indians had exclusive rights under federal treaty to take steelhead passing through the Puyallup River within the confines of the Puyallup Reservation.

In *Puyallup III* the Supreme Court of the United States decided that the language used in the 1868 Treaty of Fort Laramie was virtually identical to the language used in Article II of the 1854 Treaty of Medicine Creek, see *Puyallup III* at 174.

The court is aware that there is no language in the Treaty of Medicine Creek of 1854 and 1855 or in the Executive Order of January 20, 1857 that definitely declares or otherwise makes plain any intention to convey, nor are there any express conveyances that expressly conveyed or referred to the bed of the Puyallup River. The property involved in this lawsuit was not within the exterior boundaries of the 1280 acre Puyallup Reservation as it was established by the Medicine Creek Treaty. But, the property is within the exterior boundaries as established by the Executive Order of January 20, 1857.

It is with the foregoing in mind that the Court examines and decides the issues in this case.

The question is whether the United States conveyed beneficial ownership of the Puyallup riverbed, within the exterior boundaries of the Puyallup Reservation, to the Puyallup Indians by the Treaties of 1854-1855 and the Executive Order of January 20, 1857, and therefore continues to hold the land in trust for the use and benefit of the tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Washington upon its admission to the Union. *Montana v. U.S.*, 49 L. W 4296 and *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627-628.

As a general principle the federal government holds lands under navigable waters in trust for future states, to grant to such states when they enter the Union. There is a strong presumption against conveyance of such lands by the United States. *Montana v. U.S.*, *supra*, *U.S. v. Oregon*, 295 U.S. at 14.

This court cannot infer such a conveyance "unless the intention was definitely declared or otherwise made plain." *U.S. v. Holt State Bank*, 270 U.S. 49, at 55, *Montana v. U.S.*, *supra*.

It has been determined, however, that congress may sometimes convey lands below the high water mark of a navigable water. *Shively v. Bowlby*, 152 U.S. 1, *Montana v. U.S.*, *supra*.

Whether a grant or reservation included the bed of a navigable river depends upon whether there was demonstrated an intention to do so. That intent is to be determined from the documents which created the reservation and from other available documents and surrounding circumstances which reflect the intention of the parties. *Montana v. U.S.*, *supra*; *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 87.

In order to find that a riverbed was included within a reservation there must have been a public exigency to justify a departure from the normal rule. The Supreme Court has defined "public exigency" to include three kinds of situations. They are as follows: (1) performance of international obligations; (2) improvement of commerce, or (3) "carrying out other public purposes appropriate to the objects for which the territory was held." *U.S. v. Holt State Bank*, *supra*; *Shively v. Bowlby*, *supra*.

The establishment of an Indian Tribe can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby*, justifying a congressional conveyance of a riverbed.

The Puyallup Tribe of Indians is duly recognized by the United States Secretary of Interior. The Tribe is located on the Puyallup Indian Reservation in the Western District of Washington. Members of the Tribe are descended from Puyallup Indians who were parties to the Treaty of Medicine Creek 1854-1855 and the Executive Order of January 20, 1857.

The importance of fishing to the diet and way of life of an Indian Tribe is among the circumstances which can demonstrate the required "public exigency" sufficient to support a finding that the bed of a river was included within an Indian reservation. *Montana v. U.S.*, *supra*; *Alaska Pacific Fisheries v. U.S.*, *supra*.

This court has reviewed, weighed and evaluated all of the evidence presented herein by both parties, and the court is persuaded by the most credible evidence that at the time of the Treaty of Medicine Creek, 1854-1855, and the Executive Order of January 20, 1857, the Puyallup Indians depended primarily upon fishing for their diet, and as a primary item of trade with other Indians as well as later with non-Indians. The evidence also shows that the Puyallup Indians had occupied the area around the Puyallup River, Commencement Bay and the surrounding areas of southern Puget Sound since time immemorial.

The court is convinced by a preponderance of the evidence adduced herein, that the Puyallup Indians centered their lines in and around the

Puyallup River. Their primary diet, their spiritual, religious, political, and social life came from the river.

The court is also persuaded by a preponderance of the evidence that the establishment of the Puyallup Indian Tribe was an "appropriate public purpose" justifying a congressional conveyance of a riverbed.

The expansion of the Puyallup Reservation by the Executive Order of January 20, 1857 to include that area of the Puyallup River now at issue here was a "public exigency." The evidence is substantial, and actually uncontradicted by any credible evidence that there was an urgent and immediate need which the United States felt to meet the needs and desires of the Indians so as to end the war which was then taking place.

The land at issue here is not included within the 22 acres remaining on the reservation. The alienation of land by those certain members of the Puyallup Tribe did not transfer title to any part of the Puyallup River.

Grants of land adjacent to a navigable river generally, as a matter of law, do not include the bed of the river. *Montana v. U.S.*, *supra*. That general rule, the intent of the parties described in the Findings of Fact, and the stipulation of Defendant's counsel on this issue, all demonstrate that the bed of the Puyallup River was not included in the assignment of parcels of land to those certain Puyallup Indians made under the allotment program in 1886.

Pursuant to two acts of congress, 27 Stat. 633, and c 1816, 33 Stat. 566, certain members of the Puyallup Tribe alienated, in fee simple absolute, all but 22 acres of their 18,000 acre reservation. None of the 22 acres abuts on the Puyallup River. *Puyallup Tribe v. Dept of Game State of Washington*, 433 U.S. 165; 97 S. Ct. 2616.

Relying on *Mattz v. Arnett*, 412 U.S. 481, 93 S. Ct. 2245, 37 L. Ed. 92, the Court of Appeals, Ninth Circuit, held "that the Puyallup Indian Reservation continues to exist," *U.S. v. State of Washington*, 496 F.2d 620 (9th Cir. 1974).

The facts in this case show that by a preponderance of the evidence that the Puyallup River was at all times pertinent herein, and is still today a navigable river.

It is the opinion of this court that the preponderance of the evidence shows that the facts and circumstances herein are substantial and persua-

sive, that the United States intended, and did include, the underlying bed of the Puyallup River as part of the Puyallup Indian Reservation.

The effect of movement of a river channel on ownership of property in the vicinity of a river is to be determined by federal law. However, federal law will look to the law of the state in which the case arises for the legal standards.

Under Washington law, changes in river channels, as applied to this case, involve certain accretive changes and avulsive changes.

Under Washington law, when the bank of a navigable river forms the boundary between property owners, that boundary changes with accretive changes in the river channel. *Harper v. Holston*, 119 Wash. 436, 441, 205 Pac. 1062, 1064; *Smith Tug & Barge Co. v. Columbia Pacific Towing Corp.*, 78 Wn.2d 975, 482 P.2d 769, 771.

Any portion of the property which may have been outside of the river channel when part of the Puyallup Reservation was allotted in 1886 was added to the riverbed by a series of accretive changes between 1886 and the later 1940's and was, therefore, added to the Tribe's ownership of the bed. *Ghione v. Washington*, 26 Wn.2d 644, 175 P.2d 955, 962.

Movement of the Puyallup river by the Army Corps of Engineers, as described in the finding herein, constitutes an avulsive change under Washington law. *Harper v. Holston*, *supra*; *Ghione v. Washington*, *supra*; *Rose v. Rieding*, 13 Wn. App. 222, 534 P. 2d. 146; *Parker v. Farrell*, 74 Wn. 2d 553, 445 P. 2d 620.

When artificial relocation of a river channel leaves portions of the former channel abandoned as dry land, the owner of the river bed retains ownership of the abandoned channel under Washington law. The owner of the adjacent property to the abandoned channel does not receive title. *Hill v. Newell*, 86 Wn. 227, 149 P. 951; *Commercial Waterway District v. Washington*, 50 Wn. 2d 335, 311 P. 2d 680; *Ghione v. Washington*, *supra*.

The court now makes Findings of Facts and Conclusions of Law. They are based upon a preponderance of the evidence that the court has found most credible and all reasonable inferences drawn therefrom.

FINDINGS OF FACT

1. Jurisdiction in this case is under 28 U.S.C. 1362. Venue is proper in that the Puyallup River at issue here, runs through the Western District of Washington and empties into Puget Sound at Tacoma, Pierce County, Washington.

2. The Puyallup Tribe of Indians is an Indian Tribe with a governing body duly recognized by the United States Secretary of the Interior. The Tribe is located on the Puyallup Indian Reservation in the western part of Washington. Members of the Tribe are descended from Puyallup Indians who were parties to the Treaty of Medicine Creek (10 Stat. 1132, December 26, 1854). PTO ¶ 1; testimony of Dr. Barbara Lane.

3. The Port of Tacoma is a municipal corporation under the laws of Washington. It is neither an Indian Tribe nor an Indian person. PTO ¶ 2.

4. The Puyallup Tribe and the Port of Tacoma each claim ownership of certain real property designated parcels 133 and 134, more particularly described in Admitted Fact No. 3 in the Pretrial Order. The Port has no deed or other document reflecting ownership of the property and does not base its claim on any documentary chain of title. (The term "the property" shall be used in these findings of fact and conclusions of law to refer to the above real property.) PTO ¶'s 3, 45; Exh. 31, D-1.

5. Puyallup Indians have occupied the area around the Puyallup River, Commencement Bay, and surrounding areas of southern Puget Sound since time immemorial. Before and at treaty times, Puyallup Indians lived in a number of villages throughout the Puyallup watershed and in the surrounding area. Each village in the Puyallup River watershed was located on the banks of the Puyallup River, one of its tributaries, or on saltwater. The villages were permanent, year-round places of residence which were located as they were because of the importance of the Puyallup River and its tributaries to the Indians. Although each village was a separate unit, the villages were united by their identification with the Puyallup River watershed, as described below. Although some members would leave their village to hunt and fish for short periods, they then returned to their own villages. Each village obtained the major portion of its food and other necessities from its surrounding area within the Puyallup drainage system. The main Puyallup village was located in the vicinity of the property. PTO ¶ 6; Exhs. 24,30; testimony of Dr. Lane.

6. For Puyallup Indians, the fresh water courses of the area were the center of their world and their lives. Puyallup people identified themselves by the name of their village, which was in turn derived from the name of the water course on which the village was located. The Indians conceived of geographical boundaries not as a line around a certain area but as a waterway plus the land that surrounded it. Thus, Puyallup Indians conceived of their territory as the Puyallup River and the surrounding land. Their equivalent of political unity or allegiance was their sense of affinity with other villages and people in the Puyallup River drainage system. The Puyallups' spiritual, religious and social life centered around the river. Further the Indians identified directions by reference to the major water courses, using such terms as up-sound, down-sound, upstream, and down-stream. PTO ¶7; Exh.24; testimony of Dr. Lane.

7. Fishing for salmon and steelhead has always been central to the way of life of Puyallup Indians. Fish were the central item of their diet, primary item of trade with other Indians and later with non-Indians, and central to one of their most important religious ceremonies. Puyallup Indians have maintained that focus and dependence on fishing in accordance with their traditional ways and treaty-reserved rights. The Puyallup River has always been, and is today, the central and most important fishing area for the Tribe, and has been determined by the federal courts to be among the Tribe's usual and accustomed fishing grounds and stations as that term is used in Article 3 of the Treaty of Medicine Creek. Among the methods they used for harvesting fish in the river were weirs and traps, substantial structures which spanned the width of the river with a series of wooden tripods which were firmly implanted in the bed of the river. Although they were removed or washed out during high water, they were replaced for each fishing season. PTO ¶'s 8, 9; Exhs. 3, 24, 30, 48, 49, 50; testimony of Dr. Lane.

8. Small boats have always used the lower portion of the Puyallup River including that portion of the river in the vicinity of the property. Puyallup Indians navigated the river with their fishing boats and canoes. The Indians designed canoes especially suited to traversing the perils of the river. The canoes would often be poled rather than paddled to traverse difficult stretches. The Puyallup River was, before channelization, and is today navigable in fact. PTO ¶43' testimony of Whitney M. Borland; testimony of Frank G. Wright.

9. The United States sought treaties with the Indians in the Pacific Northwest in order to clear title to the land to allow settlement by non-Indians. Puyallup Indians and the United States signed the Treaty of Medicine Creek on December 26, 1855; the Treaty was ratified by the United States Congress on March 3, 1855. Among other provisions, the Indians ceded a large area of land to the United States but retained a small reservation "for their exclusive use" The reservation set aside by the Treaty was a rocky forested section on the south side of Commencement Bay. PTO ¶'s 4,5,16,17; Exhs. 1,2; testimony of Dr. Lane.

10. The United States representatives at the treaty council, including Territorial Governor Isaac Stevens, who was responsible for negotiating the treaties, were very familiar with the importance of fishing to the Indians. Stevens' subsequent report on the Treaty to the Commissioner of Indian Affairs demonstrates his emphasis on the need to allow the Indians to continue to fish and his intent to locate the reservations to meet the Indians' needs and desires. PTO ¶ 19; Exh. 2; testimony of Dr. Lane.

11. Soon after the Treaty was signed, fighting broke out between Indians and non-Indians in the area, resulting in the deaths of many non-Indian settlers. Among the causes of those hostilities was the inadequacy of the area set aside as the Puyallup Reservation. One of the shortcomings of the Reservation was that it did not include the Tribe's traditional fishing areas and villages along the Puyallup River. PTO ¶ 17; testimony of Dr. Lane.

12. The United States sought to end those hostilities and gain peace by convening the Fox Island Council. The United States representatives expressed their awareness that the cause of the hostilities was the inadequacy of the Puyallup Reservation. Governor Stevens reminded the Indians that he had promised to modify the treaty reservations if they were unsuitable. He asked the Indians to make known their needs and desires; he stressed that the reservation would be changed so as to conform to their wishes. PTO ¶'s 18, 20; Exh. 3; testimony of Dr. Lane.

13. Stevens recognized and emphasized the importance of the Puyallup River when he spoke of the location of the expanded reservation.

You shall have a large Res. at Nisqually, one large Res. on the Puyalooop [sic] . . . Now my children do you want a Res. on the Nis-

qually and one on the Puyalooop [sic], I will send word to the Great Father if you want a Res. at those places.

The Indians at the Council also stressed the importance of the river. with such statement as:

I know that my people all want to live on the Puyallup [Stanop-se, a Puyallup]

and

I am glad my people are going to have a Res. on the Puyallup. That is my home. [Old Simon, a Puyallup]

PTO ¶ 20; Exh. 3, testimony of Dr. Lane.

14. The parties at the Fox Island Council thus agreed to expand the Puyallup Reservation to include the lower portion of the Puyallup River. The Commissioner of Indian Affairs and Secretary of the Interior recommended that the agreement be adopted. President Pierce approved those recommendations in an Executive Order of January 20, 1857. Those recommendations show that the reservation was expanded pursuant to Article 6 of the Treaty of Medicine Creek. The expanded reservation included the property involved in this case. PTO ¶s 18, 21, 24; Exh. 3, 4; testimony of Dr. Lane.

15. Governor Stevens' report on the Treaty, the discussions at the Fox Island Council, the United States' officials' awareness of the importance of the river to the Indians for bed, and later confirmation by federal officials, all demonstrated the intention and understanding that the Puyallup River and its bed were included as part of the reservation, and the intention to secure to the Puyallup Indians ownership and control of the lands and waters within the exterior boundaries of the reservation. PTO ¶s 18-24; Exhs. 1-4, 47; testimony of Dr. Lane.

16. The hostilities which resulted from the inadequacy of the treaty reservation and which killed a number of non-Indian settlers were viewed by the United States as a serious, emergency situation, which needed an immediate response and solution. Government officials demonstrated a desire to do whatever was necessary to satisfy the Indians so as to end the fighting. Exhs. 3, 4; testimony of Dr. Lane.

17. The President of the United States assigned parcels of land within the reservation to individual Puyallup Indians in 1886. That was done

pursuant to Article 6 of the Treaty of Medicine Creek, which provided for the possibility of allotment so that the Indians "would locate on the [land] as a permanent home . . ." PTO ¶ 27; testimony of Dr. Lane. There is nothing to indicate that either the United States or the Tribe intended to include the bed in any allotments, and several factors indicating an intent to exclude it. There is nothing to indicate that the allotments changed the Tribe's traditional concept of considering the waterways and their beds as communal property. Members of the Tribe continued to use the river and its bed whether or not they had allotments bordering the river. PTO ¶s 28, 29, 47; Exhs. 1, 5-11, 14, 19, 20, 43.

18. Prior to the Army Corps of Engineers channelization project in the late 1940's the lower portion of the Puyallup River flowed through marshy lowlands in a winding series of S curves. The river has always carried a large amount of silt, sand, gravel, logs, and other sediment and debris. The river in the past deposited that material further downstream on the bed and along its banks. PTO ¶s 31, 32; testimony of Whitney M. Borland; Exhs. 13, 21-23.

19. Changes which took place in the river channel in the vicinity of the property prior to channelization were typical of rivers with the characteristics of the Puyallup River. That portion of the river was subject to a continuous process of erosion and soil deposit. That process consisted of erosion of one bank of the river, typically on the outside of a bend in the river, caused by the current of the river and debris carried by the river. At the same time, and typically on the bank opposite the place where erosion was occurring, sediment being carried by the river was deposited, extending that bank into the previous channel. Although the volume of sediment deposited and the rate of erosion varied depending on river conditions, the process in the lower portion of the river was a very gradual one which changed the banks of the river channel gradually over a period of years. PTO ¶ 33; testimony of Whitney M. Borland; Exhs. 13, 21-23.

20. The channel of the Puyallup River in the vicinity of the property gradually but continuously modified its banks and shifted its course between 1874 and the late 1940's. That change was caused by the process described in Finding 19. The river never abandoned its channel, and the total distance which the channel in the vicinity of the property moved during that period of approximately 70 years was less than the width of the channel. There is no evidence of any sudden movement by the river or

abandonment of this channel in the vicinity of the property prior to the late 1940's. PTO ¶ 34; Exhs. 21-23, 36-42; testimony of Whitney M. Borland.

21. The Army Corps of Engineers channelization project in the late 1940's removed the river from its channel in the vicinity of the property and relocated it in the artificially constructed channel, leaving the property exposed as upland on the bank of the river. Property not involved in this case was taken from the Puyallup Tribe in the condemnation action which provided land for the rechannelization project. PTO ¶ 38; Exhs. 34, 35, 46; testimony of Whitney M. Borland.

22. The river channel, in the vicinity of the property, is today in the same location as it was immediately after the channelization project. The property is not riparian to the Puyallup River. PTO ¶ 38; Exhs. 34, 35; testimony of Whitney M. Borland; testimony of William F. Kittrell.

23. As part of the channelization project, the Corps of Engineers obtained permits from the Bureau of Indian Affairs to deposit dredge spoils on the property. The Bureau was considered the appropriate agency because the property was described as Puyallup Indian Land. PTO ¶ 39; Exhs. 26, 28.

24. The maps labeled Exhibits 34-42 accurately reflect, as well as can be determined, the channel of the Puyallup River in the vicinity of the property at the times indicated on the respective maps. There are other maps of the river available, but none shed any additional light on the position of the river in the vicinity of the property. PTO ¶ 40; Exhs. 34-42; testimony of Whitney M. Borland.

25. The State of Washington was admitted to the United States in 1889. PTO ¶ 44.

26. All uncontested facts contained in the Pretrial Order, but not specifically stated in these Findings are incorporated herein by reference.

**FROM THE FOREGOING, THE COURT MAKES
THE FOLLOWING**

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this case under 28 U.S.C. 1362, in that this is an action brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, and presents a question arising under the treaties, Constitution, or laws of the United States. The Puyallup River at issue here, runs through the Western District of Washington.

2. The Puyallup Tribe and the Port of Tacoma each claim ownership of certain real property described as follows:

PARCEL 133

A parcel of land in Section 3, Township 20 North, Range 3 East, Wilamette Meridian, Pierce County, Washington, being:

That part of the Puyallup River channel as it existed immediately prior to the channelization of that portion of the river by the United States Army Corps of Engineers, adjacent to government Lots 3, 4 and 9 in said Section 3, bounded on the northeast by the former right bank of said river at the former line of ordinary highwater, and on the southwest and southeast by the Puyallup River Flood Control Project boundary;

Particularly described as, commencing at the center of said Section 3:

S. 89° 51' 17" W., 750.93'

S. 42° 23' 14" E., approximately 711.50 feet, to the former line of ordinary highwater of the Puyallup River the true point of beginning;

From the true point of beginning,

S. 42° 23' 14" E., approximately 1945 feet to a point of curve to the left in a northerly direction from whence the axis bears N. 43° 47' 11" W., 523.69 feet;

Along said curve approximately 360 feet to the former line of ordinary highwater.

Along the former line of ordinary highwater in a northwesterly direction to the true point of beginning

Containing 9.39 acres more or less.

and

PARCEL 134

A parcel of land in the former Puyallup River channel as it existed immediately prior to the channelization of that portion of the river by the United States Army Corps of Engineers, adjacent to Lot 10, Section 3, Township 20 North, Range 3 East, Willamette Meridian, Pierce County, Washington, lying between the former line of ordinary highwater on the former right bank of said river and the Puyallup River Flood Control boundary line described as:

Commencing at the southeast corner of said Section 3; thence N. 89° 42' 32" W., 940.04 feet; thence N. 42° 23' 14" W., 238.60 feet to the point of beginning: From the initial point, N. 42° 23' 14" W., 618.53 feet on a curve to the left from a radius which bears N. 46° 10' 03" W., 623.69 feet, to the former line of ordinary highwater of the former right bank of said river, Upstream along said former highwater line to the point of beginning. Containing 3.090 acres.

3. Indian Tribes have the right to file suit independently of the United States, where the United States holds the land in trust, and the Indian Tribe is the beneficial owner of the property. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365; *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465 (9th Cir.), *cert. denied*.

4. The Plaintiff Puyallup Tribe is the political successor in interest to the Puyallup Indians who signed the Treaty of Medicine Creek (10 Stat. 1132, December 26, 1854). *United States v. Washington*, 384 F. Supp. 312, 370 (W.D. Wash. 1974), *aff'd sub nom Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658 (1979).

5. As a general principle, the Federal Government holds lands under navigable waters in trust for future states, to grant to such states when they enter the Union, and there is a strong presumption against conveyance of such lands by the United States. *Montana v. U.S.* 67 L.Ed.2d at 502-505, *United States v. Oregon*, 295 U.S. at 14.

6. This court cannot infer such a conveyance "unless the intention was definitely declared or otherwise made plain." *United States v. Holt State Bank*, 49, at 55. *Montana v. U.S.*, *supra*.

It is established, however, that congress may sometimes convey lands below the high water mark of a navigable water. *Shively v. Bowlby*, 152 U.S. 1, 48. *Montana v. U.S.*, *supra*.

7. But, because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon*, *supra*, it will not be held that the United States has conveyed such land "except because of some special duty or exigency." *United States v. Holt*, 270 U. S. *supra*.

8. Whether a grant or reservation included the bed of a navigable river depends on whether there was demonstrated an intention to do so. That intent is to be determined from the documents which created the reservation and from other available documents and surrounding circumstances which reflect the intention of the parties. *Montana v. United States*, *supra*; *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87, (1918).

9. In order to find that a riverbed was included within a reservation, there must have been a public exigency to justify a departure from the normal rule. The Supreme Court has defined "public exigency" to include three kinds of situations: (1) performance of international obligations; (2) improvement of commerce; or (3) "carrying out other public purposes appropriate to the objects for which the territory was held" *United States v. Holt State Bank*, *supra*; *Shively v. Bowlby*, *supra*.

10. The establishment of an Indian Tribe can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby*, *supra*, 152 U.S. at 48, justifying a congressional conveyance of a riverbed, *se e.g.*, *Alaska Pacific Fisheries v. United States*, *supra*; *Montana v. U.S.*, *supra*.

11. The importance of fishing to the diet or way of life of an Indian Tribe is among the circumstances which can demonstrate the required "public exigency" sufficient to support a finding that the bed of a river was included within an Indian Reservation. *Montana v. United States*, *supra*, *Alaska Pacific Fisheries v. United States*, *supra*. The vital importance of the Puyallup River to the Indians for fishing as well as a variety of other reasons, as described in Findings 4, 5, 6, 7, 9, 10, and 14, above, qualifies as a public exigency as defined by the Supreme Court.

12. Expansion of the Puyallup Reservation in 1857 to include the Puyallup River was a public exigency also because of the urgent and immediate need which the United States felt to meet the desires and needs of the Indians so as to end the war which was then taking place.

13. The bed of a navigable river will be deemed included in a grant or reservation only if the intention to do so was definitely declared or otherwise made plain or was rendered in clear and special words. *Montana v. United States, supra*.

14. The intention to include the Puyallup River as part of the reservation was definitely declared by Governor Stevens and by the Indians, as described in finding 10, 11, 12, 13, and 14, above.

15. Whether or not a body of water is navigable is to be determined by federal law. *Brewer-Elliott Oil & Gas Co. v. United States*, 260, U.S. 77, 87. A river is navigable in law if navigable in fact. *The Daniel Bell*, 77 U.S. 557, 563. Since the Puyallup River was navigable in fact at the times germane to this case, as shown by the Findings of Fact and the agreement of the parties, it was navigable as a matter of law.

16. Grants of land adjacent to a navigable river generally, as a matter of law, do not include the bed of the river. *Montana v. United States, supra*. That general rule, the intent of the parties described in the findings of fact, and the stipulation of Defendant's counsel on this issue all demonstrate that the bed of the Puyallup River was not included in the assignment of parcels of land to the Puyallup Indians made under the allotment program in 1886.

17. Pursuant to two acts of congress, 27 Stat 633, and c. 1816, 33 Stat 565, the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000 acre reservation. None of the 22 acres abuts on the Puyallup River. *Puyallup Tribe v. Dept. of Game State of Washington*, 433 U.S. 165; 97 S.Ct. 2616 (1977). The land at issue here is not included within the 22 acres remaining on the reservation. The alienation of land by the Puyallup Indians did not transfer title to any part of the Puyallup River.

18. Relying on *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.E.D. 92 (1973), the Court of Appeals for the Ninth Circuit held "that the Puyallup Indian Reservation continues to exist." *U.S. v. Washington*, 496 F.2d 620.

19. The effect of movement of a river channel on ownership of property in the vicinity of the river is to be determined by federal law. Federal law will look, however, to the law of the state in which the case arises for the substantial legal standards. *Wilson v. Omaha Indian Tribe*, 422 U.S. at 659-676.

20. The changes in the river channel, and the process by which those changes took place, described in Finding of Fact, 18, above, constitute accretive changes under Washington law. *Harper v. Holston*, 119 Wash. 436, 441; 205 P. 1062, 1064 (1922); *Smith Tug & Barge v. Columbia Pacific Towing Corp.*, 78 Wn. 2d 975, 977; 482 P. 2d 769, 771 (1971), *cert. denied*, 404 U.S. 829 (1971); *Heikkinen v. Hanson*, 57 Wn. 2d 840, 843; 360 P.2d 147 (1961).

21. Under Washington law, when the bank of navigable river forms the boundary between property owners, that boundary changes with accretive changes in the river channel. *Harper v. Holston*, *supra*; *Ghione v. Washington*, 26 Wn.2d 635, 644; 175 P.2d 955, 962 (1946).

22. Any portion of the property which may have been outside of the river channel when part of the reservation was allotted in 1886 was added to the riverbed by a series of accretive changes between 1886 and the late 1940's and therefore was added to the Tribes's ownership of the bed. *Ghione v. Washington*, *supra*.

23. Movement of the river channel by the Army Corps of Engineers, described in finding 17 above, constitutes an avulsive change under Washington law. *Harper v. Holston*, *supra*; *Ghione v. Washington*, *supra*; *Rose v. Riedinger*, 13 Wn. App. 222; 534 P.2d 146 (Wn. Ct. App. 1975); *Parker v. Farrell*, 74 Wn 2d 553, 445 P.2d 620 (1968).

24. Under Washington law, when the bank of a river forms the boundary between two property owners, an avulsive change in the river channel does not affect the boundary. *Harper v. Holston*, *supra*; *Parker v. Farrell*, *supra*.

25. When artificial relocation of a river channel leaves portions of the former channel abandoned as dry land, the owner of the river bed retains ownership of the abandoned channel under Washington law. The owner of property adjacent to the abandoned channel does not receive title. *Hill v. Newell*, 86 Wash. 227; 149 P. 951 (1915); *Commercial Waterway District v. Washington*, 50 Wn. 2d 335; 311 P.2d 680 (1957); *Ghione v. Washington*, *supra*.

26. The United States did convey the beneficial ownership of the Puyallup riverbed, within the boundaries of the Puyallup Reservation, to the Puyallup Indians by the Treaties of 1854-1855 and the Executive Order of January 27, 1857.

27. The United States continues to hold the property at issue herein in trust for the use and benefit of the Puyallup Tribe.

28. Title to the bed of the Puyallup River, within the exterior boundaries of the Puyallup Reservation, did not pass to the State of Washington when it became a State of the Union in 1889.

29. Plaintiffs petition for Declaratory Judgment Quieting Title to the bed of the Puyallup River as to those parcels of real property herein described, is GRANTED.

DATED at Tacoma, Washington, this 24th day of July, 1981.

Jack E. Tanner

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JUDGMENT
CIVIL ACTION FILE NO. C80-164T

PUYALLUP INDIAN TRIBE

vs.

PORT OF TACOMA

This action came on for trial before the Court, Honorable JACK E. TANNER, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged Plaintiffs petition for Declaratory Judgment Quieting Title to the bed of the Puyallup River as to those parcels of real property herein described, is GRANTED.

Dated at Tacoma, Washington, this 24th day of July, 1981.

Bruce Rifkin
Clerk of Court

By Rosemary Freeny
Deputy in Charge,
Tacoma Office

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUYALLUP INDIAN TRIBE,
Plaintiff-Appellee,

v.

PORT OF TACOMA,
Defendant-Appellant.

No. 81-3480
D.C. No. CV 80-164-JET

OPINION

Appeal from the United States District Court
for the Western District of Washington
The Hon. Jack E. Tanner, District Judge, Presiding.

Argued and Submitted: January 4, 1983

BEFORE: BROWNING, Chief Judge, FLETCHER and PREGERSON,
Circuit Judges.

FLETCHER, Circuit Judge:

This case involves a question of title to part of the former bed of the Puyallup River. The Port of Tacoma appeals from a ruling by the district court that the Tribe received title to the riverbed by treaty in 1857 and that a river rechannelization project in 1948-50 that exposed the former riverbed was an avulsive change of the river's course which left title to the bed in the Tribe as the pre-avulsion owner. *See Puyallup Tribe of Indians v. Port of Tacoma*, 525 F.Supp. 65 (W.D. Wash. 1981). The Port further challenges the court's ruling that the State of Washington and the United States need not be joined as necessary parties. We have jurisdiction under 28 U.S.C. § 1291 (1976) and affirm.

Prior to the arrival of white settlers in the mid-nineteenth century, the Puget Sound area and the rivers that drain into it, including the Puyallup, were inhabited by Indians known as Coast Salish. In 1854, representatives of various bands and groups of these Indians entered into the Treaty of Medicine Creek with the United States. In return for a number of reservations, a guarantee of continued fishing rights, and other promises, the Indians gave up their claim to their aboriginal homeland.

One of the Indian groups that signed the Treaty of Medicine Creek was known as the Puyallup Tribe. These Indians settled on a reservation on the south side of Commencement Bay near present-day Tacoma, Washington. This site did not include access to the Puyallup River and its fishery on which the Puyallup Tribe depended. The Tribe was very dissatisfied with its reservation and agitated vigorously (and sometimes violently) for an enlargement of the reservation to include a section of the river.

The Government recognized the importance of the fishery to the Tribe as well as the importance of pacifying the Tribe to protect white settlers in the area. In 1856, following a meeting between the Government and the Tribe at Fox Island, the Government recommended an expansion of the Puyallup Reservation to include a section of the Puyallup River. On January 20, 1857, by Executive Order, President Pierce set aside certain land that encompassed a section of the Puyallup River near its mouth as an enlargement of the Puyallup Indian Reservation. See A. Josephy, *Now That the Buffalo's Gone* 181-85 (1982).

Over the next 100 years, most of the reservation was allotted to individual Indians and passed into individual Indian and non-Indian ownership. Since the Puyallup River was navigable, the allotments along the river were bounded by the ordinary high water mark of the river. The Port of Tacoma eventually took title to certain of the allotments abutting the north bank of the river.

Between 1948 and 1950, the United States Army Corps of Engineers (Army Corps) "straightened" the Puyallup River, including the section of the river that passed through the reservation. As a result, a twelve-acre tract of the former riverbed was exposed. The Port of Tacoma was the owner of the uplands at the time of the rechannelization. It took posses-

sion of the newly exposed riverbed. Since 1950, the Port has had possession and exercised control over the twelve acres of exposed former riverbed and has leased it to industrial tenants.

In 1980, the Puyallup Tribe filed suit claiming beneficial title to the twelve acres of exposed former riverbed. See 28 U.S.C. § 1362 (1976). The Tribe based its claim on the 1857 Executive Order granting to it an enlarged reservation that encompassed part of the Puyallup River. Three days before trial, the Port filed a motion based on Federal Rule of Civil Procedure 19(a), requesting that the United States and the State of Washington be joined as necessary parties. The motion was denied.

Following a bench trial, the district court ruled that (1) the 1857 Executive Order granted to the Tribe title to that part of the Puyallup River bed within the exterior boundaries of the grant; (2) no subsequent transactions had divested the Tribe of this title; (3) the 1948-50 rechannelization of the Puyallup that exposed the former riverbed was an avulsive change of the river's course under Washington law; and (4) consequently, the Tribe's title to the former riverbed was superior to that asserted by the Port of Tacoma. The Port timely appealed from the district court's judgment quieting title in the Tribe and ejecting the Port.

II

The Port first challenges the district court's refusal to join both the United States and the State of Washington as necessary parties under Federal Rule of Civil Procedure 19(a). We are not persuaded that the district court erred.

The United States, as the trustee holding legal title to all real property owned by the Tribe, obviously has an interest in this litigation and it will not be bound by any decree ensuing from this litigation unless it is formally joined as a party. *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016, 1018 (9th Cir. 1973). Absent joinder of the United States, a judgment entered in this case in favor of the Port will not necessarily render complete relief to the Port or protect the Port from inconsistent judgments. See Fed. R. Civ. P. 19(a). Nonetheless, the rule is clear in this Circuit and elsewhere that, in a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it is *not* an indispensable party in whose absence litigation

cannot proceed under Rule 19(b). *Fort Mojave Tribe*, 478 F.2d at 1017-18; *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952); see also *Oneida Indian Nation of New York v. County of Oneida*, 434 F.Supp. 527, 544-45 (N.D.N.Y. 1977)(collection cases).¹

We now turn to consider the Port's contention that the State of Washington is a necessary party to this proceeding. The Port asserts that the State has an interest in this litigation because, upon admission of Washington to statehood in 1889, it received title to all navigable streams within its boundaries then owned by the United States. See *United States v. Ashton*, 170 F. 509, 512-13 (C.C.W.D. Wash. 1909). Thus, if the Tribe had not been granted equitable title to the Puyallup River bed by treaty or by executive order and if the 1948-50 river rechannelization were avulsive, the State, and not the Port or the Tribe, would own the exposed riverbed.

Rule 19(a) requires a district court to join an absent party if any one of three specific conditions obtains: (A) in the absence of the party complete relief cannot be granted to those persons who are already parties, Fed. R. Civ. P. 19(a) (1); (B) the absent party claims an interest relating to the action and is so situated that disposition in his absence may "as a practical matter" impair the absent party's ability to protect that interest, *id.* at 19(a)(2)(i); or (C) the absent party claims an interest relating to the action and is so situated that disposition in his absence may subject a joined party to an inconsistent obligation, *id.* at 19(a)(2)(ii).² The "appropriate focus" in determining whether one or more of these conditions exist is on the "practical ramifications of joinder versus nonjoinder." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 & n.14a (9th Cir. 1983). The district court's Rule 19(a) decision will not be reversed absent a showing of abuse of discretion. *Id.* at 1043.

The Port does not specify the particular Rule 19(a) ground upon which it relies. We do not find the State a necessary party under any of the rule's criteria.

Rule 19(a)(1) would require joinder of the State if the court could not otherwise grant "complete relief" to those already parties. *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 662 F.2d 534, 537 (9th Cir. 1981). The essence of

an action in ejectment, which this case is, is to settle title between the adverse claimant and the party in possession. The district court can therefore provide complete relief to the parties to this action without joining other parties who might also claim an interest in the same land. Accordingly, Rule 19(a)(1) does not require joinder of the State in this ejectment action, even though the State might in the future challenge the title of the Tribe or the Port to the riverbed.

Rule 19(a)(2)(i) seeks to prevent the results of litigation before the court from impairing the legal interests of an absent party. Since the State can assert any interest it might have in another action, no legal interest it may have in the riverbed is impaired regardless of the outcome of this action.

Rule 19(a)(2)(ii) requires joinder to protect a party to the suit from inconsistent obligations by reason of a claimed interest of an absent party. Since the Tribe does not challenge the denial of the Rule 19(a) motion, we need reverse only if it is necessary to protect the Port's legal interests. We see no way in which the outcome of this ejectment action could possibly subject the Port to inconsistent obligations under two conflicting judgments.

A judgment adverse to the Tribe, based on a conclusion that the Tribe never received title to the bed, would not be inconsistent with a subsequent declaration requiring the Port to remove itself in favor of the State. A determination in some later suit between the State and the Port that the State's title is superior to that of the Port, based perhaps on a conclusion that the 1948-1950 rechannelization of the Puyallup was avulsive and not accretive, would simply not be inconsistent with a determination here that the Port's title was superior to that of the tribe.

Nor would a conclusion in this case that the Tribe could not eject the Port from possession of the riverbed because the 1948-1950 rechannelization was accretive subject the Port to the possibility of inconsistent obligations. As a "practical" matter, the Port now has possession of the riverbed and will retain possession if it prevails in this litigation. Even if it is determined in a subsequent suit between the State and the Port that the Tribe did not receive title to the exposed riverbed, that the rechannelization was avulsive, and thus that the State has title to the bed, the Port will thereby incur no inconsistent obligations. That it must remove itself in

favor of the State is not an obligation inconsistent with a finding that it need not relinquish possession to the Tribe.

If the Tribe prevails, the Port may be ejected and may be contractually liable to its lessees for damages resulting from the ejection. Such obligations would not be affected by a subsequent determination that the State has superior title to the Tribe. In any event, the Port would never again be entitled to possession!

For these reasons, we conclude that the district court did not abuse its discretion in refusing to join the State of Washington or the United States as a party to this action.

III

We now turn to the merits. The Port challenges, on two distinct grounds, the judgment of the district court ejecting the Port and quieting title to a portion of the former riverbed in the Tribe. First, it asserts that the United States did not convey title to the bed of the Puyallup River to the Puyallup Tribe either by treaty or by executive order. It contends that the Tribe lost whatever title it did have to the former bed when the river rechannelization project exposed the bed.

A

Appellant, citing *Montana v. United States*, 450 U.S. 544 (1981), argues that the district court erred as a matter of law in concluding that the United States conveyed title to the bed of the Puyallup River to the Puyallup Tribe. Appellee counters that the district court's conclusion on the issue of riverbed ownership is in accord with the Supreme Court's decision in *Montana v. United States* and that the district court's decision is supported by findings of fact which are not clearly erroneous. We agree with both parties to the extent that we find *Montana v. United States* controlling on the question of riverbed ownership. Accordingly, our analysis of the Tribe's claim of ownership of part of the former bed of the Puyallup River must begin with a close examination of the *Montana* decision.

In *Montana v. United States*, the Supreme Court considered a tribe's claim of title to the bed of a navigable river as it flowed through the tribe's reservation. 450 U.S. at 550-57. The Court's analysis of this issue starts from the premise that "[a] court deciding a question of title to the bed of a

navigable water must . . . begin with a strong presumption against conveyance by the United States, . . . and must not infer such a conveyance "unless the intention was definitely declared or otherwise made very plain." *Id.* at 552 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). At the same time, the court did not reject the analysis of *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), which the "Court did construe a reservation grant as including the bed of a navigable water." See *Montana*, 450 U.S. at 555-56 n.5. Nor did it gainsay the equally important proposition set forth in *Choctaw Nation* that "treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor." 397 U.S. at 631. Thus, when faced with a claim by an Indian tribe that it owns the bed of a navigable stream that flows through its reservation, we must accord appropriate weight to both the principle of construction favoring Indians and the presumption that the United States will not ordinarily convey title to the bed of a navigable river. See *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 961-62 (9th Cir.), *cert. denied*, 103 S.Ct. 314 (1982).

The Supreme Court's opinion in *Montana* provides considerable guidance as to how a court can give proper effect to both the presumption against conveyance and the principle of construction favoring Indians. First, the Court recognized that "establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shively v. Bowlby*, 152 U.S. [1, 48 (1894)], justifying a congressional conveyance of a riverbed . . ." 450 U.S. at 556. However, the Court also cautioned that "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." *Id.* at 554. The Court cited two cases, apparently to illustrate proper resolutions in the face of the competing principles: *Alaska Pacific Fisheries v. United States* and *Skokomish Indian Tribe v. France*. See *id.* at 556.

In *Alaska Pacific Fisheries v. United States*, 348 U.S. 78 (1918), the Court was called on to decide whether a grant by Congress of "the body of lands known as Annette Islands" to the Metlakatla Indians included the submerged lands surrounding and between the islands. The Court reviewed the history of the Annette Island Reservation and the Indian community and found:

The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation.

Id. at 89. Accordingly, the Court concluded that not only was Congress aware of the Indians' reliance on the adjacent fishing grounds but also, in view of the importance of fishing to the Indians,

Congress . . . did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands . . . embracing the intervening and surrounding waters as well as the upland . . .

Id.

In *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963), this court found that an Executive Order granting certain sections of land along the Hood Canal to the Skokomish Indians did not include a grant to the Tribe of tidelands below the ordinary high water mark. *Id.* at 210. The dispositive factor in construing the Executive Order to exclude a grant of the tidelands was the fact that the Tribe did not rely on the particular tidelands included in the reservation as an important source of food.

The use of the tidelands by the Indian tribe, as disclosed by the evidence, does not support appellant's contention that the tidelands were essential to the Indians' livelihood and that the Indians accordingly must have understood they were to have the tidelands.

...

It is true that shellfish and other forms of sea life were gathered by the Skokomish along the canal . . . "[T]he usual locations at which shellfish were procured were miles from the reservation and were reached by canoe travel on Hood Canal;" and . . . "the tidelands in issue, particularly in Section 26, are not and were not a source of native shellfish in usable quantities."

Id. at 210-11.

From the facts of *Skokomish Tribe* and *Alaska Pacific Fisheries*, we conclude that where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant

must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant? In such a situation, the Government's awareness of the importance of the water resource to the Tribe taken together with the principle of construction resolving ambiguities in transactions in favor of the Indians warrants the conclusion that the intention to convey title to the waters and lands under them to the Tribe is "otherwise made very plain" within the meaning of *Holt State Bank*, 270 U.S. at 55, quoted in *Montana*, 450 U.S. at 552.

This conclusion is confirmed by the penultimate paragraph of that section of the *Montana* decision dealing with the question of title to the Big Horn River bed:

Moreover, even though the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby*, 152 U.S., at 48, justifying a congressional conveyance of a riverbed, see, e.g., *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 85, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. See *Shively v. Bowlby*, *supra*, at 48. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life. 1 App. 74. Cf., *Alaska Pacific Fisheries v. United States*, *supra*, at 88; *Skokomish Indian Tribe v. France*, 320 F.2d 205, 212 (CA9).

450 U.S. at 556 (emphasis added); see also *id.* at 570 (Blackmun, J., dissenting in part) (accepting majority's analysis, but concluding that there was a "public exigency" requiring Congress to convey bed of Big Horn River to tribe, since, *inter alia*, fishing was important to the Crow Tribe). Further, the recent Ninth Circuit decision in *Confederated Salish and Kootenai Tribes v. Namen* supports the conclusion that title to land submerged under navigable waters may pass to the tribe whose reservation encompasses the navigable water where that tribe is dependent on the water's resources for survival. 665 F.2d at 962 (the importance of fishing to the Kootenai Tribe cited as one of several factors distinguishing *Namen* from *Montana*).

In order to apply the teachings of *Montana* to the case before us, we review briefly those facts relevant to a determination of whether the United States made plain its intention to convey to the Puyallup Indians that portion of the Puyallup River bed that runs through their reservation. The Puyallup Tribe was one of the signatory tribes to the 1854 Treaty. Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, 1132; see also A. Josephy, *Now That the Buffalo's Gone* 181-82 (1982). The Puyallup Indians have occupied the area around the Puyallup River, Commencement Bay, and surrounding parts of Southern Puget Sound since time immemorial. At the time the Tribe entered into the 1854 Treaty, its members "were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers. Anadromous fish was the great staple of their diet and livelihood. They cured and dried large quantities for year-round use, both for themselves and for others through sale, trade, barter and employment." *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 665 n.6 (1979)(quoting *United States v. Washington*, 384 F. Supp. 312, 406 (W.D. Wash. 1974)). Indeed, as the district court found, "[f]or Puyallup Indians, the fresh water courses of the area [from which they caught anadromous fish] were the center of their world and their lives . . . Puyallup Indians conceived of their territory as the Puyallup River and the surrounding land . . . The Puyallups' spiritual, religious and social life centered around the river." *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F.Supp. at 71. Governor Isaac Stevens, who was primarily responsible for negotiating the Treaty of Medicine Creek with the Indians on behalf of the United States, was aware of the importance of the fisheries to the Indians. *Fishing Vessel Association*, 443 U.S. at 666. Nonetheless, the original treaty of 1854 granted the Puyallups a reservation removed from their river without read access to their traditional fishing and village sites. In return for this unsuitable reservation, the Tribe relinquished its interest in its lands around Puget Sound so that the area could be opened for white settlement. See generally A. Josephy, *Now That the Buffalo's Gone* 181-85 (1982).

Needless to say, the Puyallups quickly recognized the inadequacy of their original reservation. As the district court found:

Soon after the [1854] Treaty was signed, fighting broke out between Indians and non-Indians in the area, resulting in the deaths of many

non-Indian settlers. Among the causes of those hostilities was the inadequacy of the area set aside as the Puyallup Reservation. One of the shortcomings of the Reservation was that it did not include the Tribe's traditional fishing areas and villages along the Puyallup River.

Puyallup Tribe of Indians v. Port of Tacoma, 525 F.Supp. at 72. The district court went on to find, based on expert testimony and documentary evidence, the following facts of particular importance to the question of riverbed ownership raised in the instant case:

The United States sought to end . . . hostilities and gain peace [with the Puyallup and other Indians] by convening the Fox Island Council. The United States representatives expressed their awareness that the cause of the hostilities was the inadequacy of the Puyallup Reservation. Governor Stevens reminded the Indians that he had promised to modify the treaty reservations if they were unsuitable . . .

Stevens recognized and emphasized the importance of the Puyallup River when he spoke of the location the expanded reservation.

You shall have a large Res. at Nisqually, one large Res. on the Puyalooop [sic] . . . Now my children do you want a Res. on the Nisqually and one on the Puyalooop [sic], I will sent word to the Great Father if you want Res. at those places.

The Indians at the [Fox Island] Council also stressed the importance of the river with such statements as:

I know that my people all want to live on the Puyallup [Stanopse, a Puyallup].

and

I am glad my people are going to have a Res. on the Puyallup. That is my home. [Old Simon, a Puyallup].

The parties at the Fox Island Council thus agreed to expand the Puyallup Reservation to include the lower portion of the Puyallup River. The Commissioner of Indian Affairs and Secretary of Interior recommended that the agreement be adopted. President Pierce approved those recommendations in an Executive Order of January

20, 1857. Those recommendations show that the reservation was expanded pursuant to Article 1 of the Treaty of Medicine Creek. The expanded reservation included the property involved in this case.

Id. It is in light of these pertinent facts that we must apply *Montana v. United States*.⁸

The findings of the district court support the conclusion that the 1857 Executive Order was a response to a public exigency—avoiding hostilities between the Indians and settlers so that the Puget Sound area could be opened safely for settlement. See *United States v. Montana*, 450 U.S. at 556 (citing *Shively v. Bowlby*, 152 U.S. at 48). The intention to convey title to the riverbed to the Puyallup Tribe was made very plain by the negotiations between Governor Stevens and the Tribe at Fox Island. First, as in *Alaska Pacific Fisheries*, it was important to the Indians who met at Fox Island to have dominion not only over the water but also over the land submerged beneath the water. Compare *Alaska Pacific Fisheries*, 248 U.S. at 87-90 (Indians sought to control non-Indian fish-trap built on submerged lands near the shore of the Annette Islands) with *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F.Supp. 65, 71 (W.D. Wash. 1981) (Puyallup harvested fish with weirs and traps, "substantial structures which spanned the width of the river [and] were firmly implanted in the bed of the river"). Second, and more important, unlike the situation in *Montana*, where the Crow Reservation was designed without special regard to the fact that it included a section of the Big Horn River, the Puyallup Reservation, at the insistence of the Indians, was enlarged specifically to include a segment of the Puyallup River.

The appellant does not seriously argue that the Puyallups would have understood the 1857 grant of land in any way other than as a conveyance to them of a section of the Puyallup River. Accordingly, we hold that there is sufficient evidence in this case of an intent to convey lands beneath navigable waters to the Tribe to support its claim of beneficial ownership of the former Puyallup River bed. See *United States v. Aranson*, 696 F.2d 654, 664-66 (9th Cir. 1983). The district court's decision on this point is therefore affirmed.¹⁰

B

The Port further contends that, even if the 1857 Executive Order granted title to the riverbed to the Tribe, the rechannelization of the riverbed in 1948-50 shifted title to the bed to the Port, the owner of the uplands adjoining the pre-channelization riverbed. By contrast, the Tribe argues that the district court properly concluded that the change in the location of the river resulting for the rechannelization by the Army Corps was "avulsive" under Washington property law and thereby left title to the riverbed in the Tribe, the party who owned the property immediately prior to the rechannelization. We conclude that the Tribe has the better position!¹

The Puyallup River was navigable at the time allotments to the predecessors in title to the Port were made. Since grants of property bounded by a navigable river are deemed to be bounded by the ordinary high water mark of that river, see *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942), the district court correctly ruled that the allotments of land adjoining the river made by the United States, on behalf of the Tribe, to the predecessors in title of the Port were bounded by the ordinary high water mark of the Puyallup River. See 525 F.Supp. at 76. Thus, after the allotments were made, the Tribe continued to have title to the riverbed of the Puyallup River within the reservation bounded on each side by the ordinary high water marks of the river.

For this reason, the common boundary of the properties to which the Port and the Tribe had title in 1948 was defined by the ordinary high water mark of the Puyallup River.² Consequently, we must consider whether the movement of the Puyallup River in 1948-1950 was an "avulsive" or an "accretive" change under Washington law. If the rechannelization were avulsive, title to the bed is in the Tribe. If accretive, the title to at least some, if not all, of the riverbed now lies in the Port as upland owner on one side of the bed, and the Tribe would have no basis for ejecting the Port!³

Several Washington cases make clear that whether a change in a physical aspect of a river is avulsive under Washington law depends on the *suddenness* and the *size* of the change. Where the change is both sudden and significant, the change is avulsive and the real estate boundaries dependent on the physical aspect of the water course are deemed fixed from that point onward as they were in fact immediately before the avulsive change took place.

In *Ghione v. State*, 26 Wash. 2d 635, 650, 175 P.2d 955, 962 (1946), for example, the Washington Supreme Court held that where a navigable riverbed had shifted by a "slow and continuous process," the boundary between the upland owner and the riverbed owner, defined as the ordinary high water mark of the river in the original grant, shifted along with the actual ordinary high water mark of the river. See *id.* (citing cases). Similarly, in *Harper v. Holston*, 119 Wash. 436, 443, 205 P.1062, 1064 (1922), the court held that where the actual meander line of a non-navigable stream had not moved by any "sudden or violent changes," the boundary of a tract described as the meander line of the stream was in accordance with the actual meander line.

By contrast, in *Parker v. Farrell*, 74 Wash.2d 553, 555-56, 445 P.2d 620, 622-23 (1968), the court held that where a "log jam" caused a river to "suddenly change [] its flow" and to move 500 feet to the south, the boundary of a tract defined as the thread of the river remained at the location where the thread of the river had been immediately before the change. Likewise, in *Ghione*, the court held that where a riverbed dried up as the result of a project of a commercial waterway district, the change was avulsive and left ownership of the former riverbed, now dry, in the party who had owned the riverbed when submerged. 26 Wash.2d at 651, 659-60, 175 P.2d at 962, 965.

The district court did not specifically find that the change in the configuration of the Puyallup during the rechannelization project in 1948-50 was sudden and significant. Rather, the court simply determined that the Army Corps had in fact "removed the river from its channel . . . and relocated it in the artificially constructed channel, leaving the property exposed as upland on the bank of the river." 525 F.Supp. at 73-74. Nevertheless, the record nowhere indicates, nor does the Port argue, that the movement of the river southward by at least half its width in a period of less than two years was not in fact sudden and significant as opposed to gradual and imperceptible. Under the principles set forth by the Washington Supreme Court, the change in the banks of the river resulting from the Army Corps project falls squarely within the category of avulsive changes. Consequently, we conclude that the district court correctly ruled that the Tribe holds title to the Puyallup riverbed as it existed immediately before the 1948-50 change.

The Port argues strenuously that, even if the 1948-50 change should ordinarily be treated as avulsive, *Strom v. Sheldon*, 12 Wash. App. 66,

527 P.2d 1382 (1974), requires a finding that the riverbed accreted to the property of the Port, the pre-change upland owner. this contention is meritless.

In *Strom*, one of two landowners whose properties were bounded by the "thread" of a stream dredged the stream, moving the stream onto his property, and thereby left the former thread of the stream on dry land. *Id.* at 1383. As a result, the lot line of the non-dredging neighbor would have terminated far short of the river if the avulsive change rule were applied. *Id.* While assuming that the change in the river flow was in fact avulsive, the *Strom* court invoked a theory of "equitable treatment" first described by the Washington Supreme Court in an earlier case involving lakeshore navigation rights and refused to hold that the boundary line between the two property owners remained at the thread of the river immediately before the assumedly avulsive dredging. *Id.* at 1384-86. Emphasizing that it was the "defendants' predecessor himself who caused the shift in the corse" of the river and that to apply the avulsive rule would deprive the plaintiffs of a "valuable riparian interest," *id.* at 1386, the court ruled that the boundary line shifted along with the actual meander line of the stream, despite the avulsive change.

We do not read the decision of the Washington court of appeals in *Strom* to effect a radical abandonment of the well-settled principles governing real estate boundaries defined by physical aspects of watercourses in favor of a system of ad hoc determinations based on "equitable treatment" of the parties for all cases in which the allegedly avulsive change was the product of human as opposed to natural activity. To do so would be to ignore the decision of the Washington Supreme Court in *Ghione v. State*, where the court held that a change in the configuration of a river resulting from a commercial waterway project was avulsive. See 26 Wash.2d 635, 655, 659-60, 175 P.2d 955, 962, 965 (1946).

Rather, we construe *Strom* to carve out a limited exception where (1) one of the two conflicting landowners has in fact caused the river change which would otherwise be characterized as avulsive and (2) the other landowner would be deprived of river access by such a characterization. This is the more natural reading of the court's repeated emphasis in *Strom* of the fact that it was the acts of the defendants' own predecessor that caused the allegedly avulsive change. Since the Tribe was not responsible for the rechannelization, the special principle of "equitable treatment"

espoused in *Strom* is inapplicable. The ordinary avulsive change rule fully applies.¹⁴

IV

For the reasons set forth above, we affirm the district court's ruling that the State of Washington and the United States need not be joined. We further affirm its well-considered determination that the Executive Order of 1857 granted title to the riverbed to the Tribe and that the rechannelization resulted in an avulsive change in the Puyallup River, fixing the boundaries of the riverbed property owned by the Tribe by the location of the ordinary high water marks of the river immediately before the relocation of the river.

AFFIRMED.

FOOTNOTES

¹*Minnesota v. United States*, 305 U.S. 382, 386-88 (1939), and *Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975), do not hold otherwise. In both *Minnesota* and *Tulalip Tribes*, the litigation was instituted by non-Indians for the purpose of effecting the alienation of tribal or restricted lands, not by individual Indians or a tribe seeking to protect Indian land from alienation. See *Oneida Nation*, 434 F.Supp. at 545 (distinguishing cases). Whether the Tribe is the plaintiff or the defendant in any given suit would not seem particularly relevant in a joinder decision under Rule 19(b), according to the factors set forth in the rule. We do not question, however, the distinction established in our circuit by the *Fort Mojave* and *Tulalip Tribes* cases for determining indispensability under Rule 19(b).

Rule 19(a) provides in pertinent part: *Persons to be Joined if Feasible*. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substan-

tial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

⁹The State could suffer immediate practical impairment of its interest if, for instance, it were the Port's lessor but was not itself in possession of the riverbed. See *Washington v. United States*, 87 F.2d 421, 428-31 (9th Cir. 1936). Here, however, where neither the State itself nor any lessee of the State is asserted to be in possession of the riverbed, no practical impairment of the State's interests can result from an adjudication of who, between the Tribe and the Port, shall have possession of the riverbed.

¹⁰*McShan v. Sherrill*, 283 F.2d 462, 463-64 (9th Cir. 1960), in which we held that landowners asserting a claim to property that was the subject of part of a quiet title action were parties who should have been joined, does not require a contrary conclusion. First, in *McShan*, record title to the land at issue was in the absentees. Hence, any adjudication in their absence would "place [] a cloud upon the title of the absent landowner." 283 F.2d at 463. By contrast, in the ejectment action before us, a determination of the right to possession between the Port and the Tribe will not, in any practical sense, place any cloud on any title the State might have, since in any event record title to the property is not in the State. More significantly, while the *McShan* absentee had paid "all taxes" on the property, presumably on the assumption that they in fact owned the property, there is no indication here that the State has incurred any economic detriment in reliance on any purported right of ownership of the riverbed. For this reason as well, we conclude that the possible practical effects of this litigation on the State's interests are of an entirely different order from that of those requiring joinder in *McShan*.

¹¹If the Port were to attempt to eject the State after the latter had ejected the Tribe, asserting that the rechannelization was accretive, the Port would meet a collateral estoppel defense based on the necessary finding here that the rechannelization was avulsive.

¹²This principle of treaty construction applies with equal force to statutes passed for the benefit of Indians, *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918), and to executive orders, *Moore v. United States*, 157 F.2d 760, 762 (9th Cir. 1946); see *Skokomish Indian Tribe v.*

France, 320 F.2d 205, 207-08 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964).

⁷We do not mean to suggest that this is the only circumstance in which the United States may be found to have granted the bed of a navigable water to an Indian tribe, but it is certainly one of the clearest. See *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 961-62 (9th Cir.), *cert. denied*, 103 S.Ct. 314 (1982).

⁸The district court's findings of fact, quoted above are not clearly erroneous. For the most part, the district court relied on the expert testimony of Dr. Barbara Lane as the basis for its findings with respect to the historical facts surrounding the Treaty of Medicine Creek, the Fox Island Council, the United States' interest in those proceedings, and the way of life and understanding that the Puyallup Tribe brought to the negotiations with the United States. Dr. Lane's expertise in this area was recognized in *United States v. Washington*, 384 F.Supp. 312, 350 (W.D. Wash. 1974), and the Port has offered no reason to doubt the reliability of her testimony.

⁹The Tribe does not contend that the 1854 Treaty of Medicine Creek conveyed title to the bed of the Puyallup River to it. Rather, it relies on the 1857 Executive Order, which expanded the reservation under the terms of the Treaty, as the conveying agreement.

¹⁰The Port's further arguments against the conclusion that the Tribe received title to the bed of the Puyallup River in 1857 are meritless. The appellee, Puyallup Tribe, is the successor to the tribe that received title to the river in 1857. See *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165, 169 n.7 (1977) (*Puyallup III*); F. Cohen, *Handbook of Federal Indian Law* 6 (1982 ed.). An Executive Order may convey title to land to an Indian tribe as effectively as any other conveyance from the United States. See F. Cohen, *supra*, at 472, 493-97 (Generally, property rights in executive order reservations are similar to those in reservations created pursuant to treaty or statute . . .").

Finally, the Port of Tacoma asserts that footnote 12 in *Puyallup III* bars the conclusion that the Tribe holds title to any part of the former Puyallup River bed. But as the Supreme Court acknowledged in that footnote, a claim of riverbed ownership was not even raised in *Puyallup III* and hence could not have been decided by the Court.

¹¹Under *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671 & n.8, 676 (1979); the question of ownership of land that is allegedly part of an Indian reservation and has allegedly never been conveyed away by the United States or by the Tribe is an issue of federal law to be settled by reference to local law. See *United States v. Aranson*, 696 F.2d 654, 658 (9th Cir. 1983). Hence, Washington property law rules are incorporated into federal law to determine whether the Tribe now has title to the riverbed.

¹²The Port does not challenge the district court's conclusion that all changes in the configuration of the Puyallup River from the date allotments were first made in 1886 up to the date of rechannelization were accretive changes under Washington law. See 525 F.Supp. at 76-77. The common boundary of the riverbed and the allotted property therefore changed over the years between 1886 and 1948 to conform to the actual ordinary high water mark of the river. Thus, in 1948, immediately prior to the rechannelization, the Tribe had title to the riverbed of the Puyallup, bounded by the ordinary high water marks of the river as they then lay. See *Ghione v. Washington*, 26 Wash. 2d 635, 650, 175 P.2d 955, 962 (1946)(where bank of river forms boundary of two estates, the boundary changes with accretive changes in river bank).

¹³The accretion/avulsion principle of Washington real property law is an interpretive rule used in construing the terms of a grant describing the boundaries of real estate in words relating to a physical aspect of a river, e.g., a river's "ordinary high water mark," or its "thread." The rule is based largely on the implied if not actual concerns of the owners of real estate.

The Washington Supreme Court has summarized the principle as follows:

When the course of the stream changes, the boundary line may or may not shift with the stream. If the change is slow and imperceptible so that it may be classified as accretion or reliction, the boundary line shifts. If, however, the change of the stream is avulsive, the original boundary line remains.

Parker v. Farrell, 74 Wash.2d 553, 554-55, 445 P.2d 620, 622 (1968)(footnote omitted).

¹⁴The Port also contends that the district court abused its discretion in not certifying to the Washington Supreme Court the question of whether the change caused by the rechannelization of the Puyallup River was avulsive or accretive. See *Lehman Brothers v. Schein*, 416, U.S. 386, 390-91 (1974). This contention is meritless. Whatever further clarity certification would have provided, since the Washington law is rather well-defined, the trial judge's refusal to certify was not an abuse of discretion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUYALLUP INDIAN TRIBE,
Plaintiff-Appellee,

v.

PORT OF TACOMA,
Defendant-Appellant.

No. 81-3480

D.C. No. CV 80-164-JET

ORDER

BEFORE: BROWNING, Chief Judge, and FLETCHER and PREGER-
SON, Circuit Judges.

The petition for rehearing of the Port of Tacoma is hereby denied. The panel declines to consider the suggestion for rehearing en banc. 9th Cir. R. 12.

UNITED STATES COURT OF APPEALS
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No. 81-3480
DC CV 80-164 JET

APPEAL from the United States District Court for the WESTERN District of WASHINGTON (Tacoma)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the WESTERN District of WASHINGTON (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 15, 1983.